LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 22 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1043

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

P. D. THOMSON
JOSEPH Z. FLEMING
Attorneys for Petitioner
Paul & Sams
1314 First National Bank Building
Miami, Florida 33131

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	17
Appendix A:	
Decisions, Orders and Opinions Below—	
1. Opinion of the Court of Appeals	1a
2. Order on Petition for Rehearing	17a
3. Decree of the Court of Appeals	18a
4. Decision and Order of the National Labor Relations Board	25a
5. Trial Examiner's Decision	28a
Appendix B:	
Statutes Involved	49a
Appendix C:	
Regulations Involved	53a

CITATIONS

Cases:

	Page
Bell v. Swift & Company, 283 F.2d 407 (5th Cir. 1960)	8
Boire v. The Miami Herald Publishing Company, 343 F.2d 17 (5th Cir. 1965)	13n.7
Harvey Aluminum (Incorporated) v. NLRB, 335 F.2d 749 (9th Cir. 1964)	13
Hickman v. Taylor, 329 U.S. 495 (1947)	9
Jencks v. United States, 353 U.S. 657 (1957)	9, 13
NLRB v. Adhesive Products Corporation, 258 F.2d 403 (2nd Cir. 1958)	13
NLRB v. Katz, 369 U.S. 736 (1962)	2, 8, 15, 16
NLRB v. Movie Star, Inc., 361 F.2d 346 (1966)	12n.6
NLRB v. Southern Materials Company, 345 F.2d 240 (4th Cir. 1965)	7n.3, 12
NLRB v. Vapor Blast Manufacturing Company, 287 F.2d 402 (7th Cir. 1961)	7n.3, 13
Pacific Molasses Company v. F.T.C., 356 F.2d 386 (5th Cir. 1966)	10, 12n.6
Tiedman v. American Pigment Corporation, 253 F. 2d 803 (4th Cir. 1958)	8, 9n.4

CITATIONS (Cont'd)

Page

Constitutional Provisions:

U.S. Const. amend. V (Appendix B, *infra*, p. 49a) ... 12

Statutes:

Administrative Procedure Act
(80 Stat. 381, 5 U.S.C. 551-559; Appendix B, *infra*, p. 49a)

Section 552 ... 3, 14n.10

Section 554 ... 3, 12

Section 556 ... 3, 12

Labor-Management Relations Act, 1947
(61 Stat. 136, 29 U.S.C. 151 *et seq.*; Appendix B, *infra*, p. 51a)

Section 8(a)(1) ... 3

Section 8(a)(3) ... 3

Section 8(a)(4) ... 3, 13

Section 8(a)(5) ... 3, 6, 7,

Section 10(b) ... 3, 11

CITATIONS (Cont'd)

Page

Rules and Regulations:

Fed. R. Civ. P. 11, 12

National Labor Relations Board, Rules and Regulations, (C. F. R. Sec. 102.1 *et seq.*; Appendix C, *infra*, p. 53a)

Section 102.30 ..... 3, 11, 12n.6

Section 102.35 ..... 3, 11, 12n.6

Miscellaneous:

Clark, Code Pleading (2d ed. 1947) 9

4 Moore, Federal Practice (2d ed. 1967) 9

Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 719 (1961) 13n.7

Pre-Trial Discovery and Preparation for Trial, 20 Ad. L. Rev. 55 (1967) ..... 14n.8 and n.9

Report of the Committee on Practice and Procedure under the National Labor Relations Act, Section of Labor Law, A.B.A. Rep. (1966) 13, 14

Wright, Federal Courts (1963) 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Safway Steel Scaffolds Company of Georgia ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 7, 1967 and entered as its decree on November 8, 1967, after denial of the Petitioner's Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, p. 1a; R., Vol. III, 122) is reported at 383 F. 2d 273. The per curiam order denying Petitioner's Petition for Re-

hearing from such opinion (Appendix A, *infra*, p. 17a; R., Vol. III, 164) is unreported. The Decision and Order of the National Labor Relations Board (Appendix A, *infra*, p. 25a; R., Vol. I, 116) is reported at 153 NLRB No. 32.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1967, that Court denied Petitioner's Petition for Rehearing by per curiam order entered on October 24, 1967, and on November 8, 1967 that Court issued its decree enforcing in part and denying in part the Decision and Order of the National Labor Relations Board (hereinafter referred to as "the Labor Board"). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Could the Court of Appeals determine that Petitioner had a right to discovery in this case where the dispositive issue is credibility but then deny Petitioner discovery solely on an assumption based on no evidence, in the record or elsewhere, that use of discovery could not have yielded relevant information on this issue?

2. Do the Labor Management Relations Act, the Rules and Regulations of the National Labor Relations Board, the Administrative Procedure Act, and due process of law as guaranteed by the United States Constitution, require administrative agencies to utilize pre-hearing discovery?

3. Is the decision of the Court of Appeals contrary to this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962) by concluding that unilateral action after an impasse

in bargaining can be made retroactively illegal by virtue of a union bargaining offer occuring after the unilateral action?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are the Fifth Amendment to the United States Constitution, Sections 552, 554 and 556 of the Administrative Procedure Act, (80 Stat. 381, 5 U.S.C. §§ 552, 554, 556) and Sections 8(a)(1), (3), (4), (5) and 10(b) of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151 *et. seq.*) (hereinafter "the Act") (Appendix B hereto). The regulations involved are Sections 102.30 and 102.35 of the Labor Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. (29 C.F.R. Sec. 101.1 *et. seq.*) (Appendix C hereto).

STATEMENT OF THE CASE

These proceedings originated in an unfair labor practice charge of Teamsters Local 290 ("the Union") (R., Vol. I, 25). The Labor Board issued a Complaint against Petitioner, alleging that Petitioner violated Sections 8(a)(1), (3) and (5) of the Act (R., Vol. I, 30, 65). Prior to the hearing on the Complaint Petitioner repeatedly sought and was just as repeatedly denied use of any pre-trial discovery procedures.[1] The Trial Examiner denied discovery

[1]The Trial Examiner also refused to exclude from consideration testimony of one of the General Counsel's witnesses after the General Counsel refused to produce for cross-examination written statements of pre-hearing interviews with that witness (R., Vol. II, 20). The Labor Board attempted to patch up this error by stating that it was ignoring the testimony (R., Vol. I, 116n. 1). The Court of Appeals, although finding the Trial Examiner's action unlawful, accepted the Board's explanation (R., Vol. III, 128).

because "There is no provision in the Act authorizing the use of discovery procedure (R., Vol. I, 60, 64). Petitioner made the following motions for prehearing discovery:

(i) Motion for Bill of Particulars (R., Vol. I, 39);

(ii) Motion for Leave to Take Depositions (R., Vol. I, 53);

(iii) Application for Leave to Take Depositions on Written Interrogatories (after denial of leave to take oral depositions) (R., Vol. I, 60-61);

(iv) At the hearing of this case before the Trial Examiner and before the taking of any testimony, Petitioner renewed each of these motions (R., Vol. II, 3).

The Labor Board affirmed the total denial of discovery (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 117).

The Court of Appeals ruled that the Labor Board was wrong in denying discovery, that the Act does provide for pre-hearing discovery, that the Labor Board has properly implemented the statutory provision in its rules and that it improperly denied discovery here. Denial of pre-hearing discovery was error. Nevertheless, the Court of Appeals found this error to be non-prejudicial. (Appendix A, *infra*, p.p. 4a-7a; R., Vol. III, 128-129).

The Labor Board then, by Petition for Rehearing, advised the Court of Appeals that the Court had incorrectly assumed that the Board's rules provided for discovery. The

Labor Board instead insisted that the Act and its rules "*do not* provide for pre-trial discovery procedures." (emphasis in original) (R., Vol. III, 159). The Labor Board said that the depositions referred to in its rules were only to be used "to perpetuate testimony of witnesses who may be unavailable at the time of trial". *Ibid.*[2] Since the Board's rules on their face do not provide any such limitation, it might have been supposed that this *ex cathedra* interlineation of its rules would have disturbed the Court of Appeals. It did not.

The Trial Examiner found that Petitioner threatened and coerced its employees, bargained in bad faith, unlawfully reduced wages and unlawfully refused to reinstate certain employees (Appendix A, *infra*, p.p. 39a-40a; R., Vol.I, 92-93). Petitioner excepted to these findings (R., Vol. I, 101) and in addition sought to reopen the record to introduce additional evidence, supported by sworn affidavits, refuting key credibility determinations of the Trial Examiner (R., Vol. I, 109). The Labor Board refused to reopen the record (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 116) and affirmed and adopted all essential determinations of the Trial Examiner (Appendix A, *infra*, p. 26a; R., Vol. I, 117).

All of the rulings of the Labor Board were based on resolutions of credibility. The findings of threats and coercion were made solely on the basis of credibility determinations. The refusal to bargain finding in turn was

---

[2]The Court of Appeals noted in its decision that it had in a previous case found no abuse of discretion by the Board in denying discovery. (R., Vol. III, 127n.6) Apparently the Court was unaware that the Labor Board's denial of discovery was not the exercise of discretion but instead was an automatic matter.

based on the illegal motivation found to exist by reason of the threats and coercion, and was not based on any external facts. (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 116-117). The determination that the reduction of wages was unlawful was likewise based solely on the motivation gleaned from the threats and coercion. The determination of unlawful refusal to rehire was based solely on the refusal to bargain findings. The Court of Appeals bowing, somewhat cautiously, to the Labor Board's expertise, approved these determinations. While Petitioner believes that these credibility resolutions contradicted both indisputable facts and common sense, Petitioner's only assertion here is that the Labor Board's action in making findings based solely on credibility was unlawful after denial of pre-hearing discovery.

The Court of Appeals had its doubts about the credibility resolutions of the Labor Board. However, it explained away "any uneasiness" that it might have on this question by finding something the Labor Board never found — that Petitioner's wage reduction, in and of itself, was a clear violation of Section 8(a)(5) of the Act (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 134-135). The Court of Appeals refused to remand this issue to the Labor Board for determination. (See Petitioner's Petition for Rehearing, (R., Vol. III, 146) and denial thereof (Appendix A, *infra*, p. 17a; R., Vol. III, 164)).

REASONS FOR GRANTING THE WRIT

This Court must decide whether due process of law requires administrative agencies to allow parties to utilize pre-trial discovery or whether administrative agencies, alone, may still require trial-in-the-dark. The question is significant not only because a conflict exists between

Courts of Appeals[3] but also because of the constantly increasing role administrative agencies play in our society.

As has been stated, the sole basis for the Labor Board's conclusion that Petitioner violated the Act was its factual determination that Petitioner had an underlying illegal motivation, based on its credibility resolutions. The Court of Appeals recognizing at least twice in its decision that the Board findings all devolved from credibility determinations (Appendix A, *infra*, p.p. 3a,11a-12a; R., Vol. III, 124, 133-134) in turn refused to question these findings because of the "substantial evidence" rule. (Appendix A, *infra*, p. 10a; R., Vol. III, 132).

Because the credibility findings were determinative here, the denial to Petitioner of discovery procedure was dispositive of the ultimate decision. Denial of discovery must be evaluated in that context.

The Court of Appeals suggested at one point that the Labor Board's findings might be supported by a factor other than credibility, specifically that Petitioner's reduction of wages at the time of the strike constituted a separate violation of 8(a)(5) in that no impasse in the bargaining negotations then existed. (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 134-135). The Labor Board never made such a determination, but rather found that because of Petitioner's illegal motivation, no genuine impasse existed. The Labor Board specifically found:

---

[3]Compare the Court of Appeals decision here and that of the Fourth Circuit in *NLRB v. Southern Materials Company*, 345 F. 2d 240 (4th Cir. 1965) on the one hand with *NLRB v. Vapor Blast Manufacturing Company*, 287 F. 2d 402, 408 (7th Cir. 1961).

> "Although the negotiators had reached an *apparent deadlock* at the time the . . . [Petitioner] cut wages, the . . . [*Petitioner*] *had not bargained in good faith* . . . and thus there was not *a genuine impasse* in the bargaining negotiations which would justify unilateral action." (R., Vol. I, 117 n. 3). (emphasis added).

Thus, even assuming that the Court of Appeals could have found no impasse to exist, this finding also was derived from the essential credibility determinations. (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 135). In any case the Court of Appeals' decision in this regard is directly contrary to this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962).

1. Denial of Petitioner's various attempts at discovery was prejudicial and the Court of Appeals erred in not remanding the case to the Labor Board. In its opinion, the Court of Appeals stated:

> "The question remains whether the error was prejudicial. It is clear that in ordinary civil cases tried in federal courts, an appeal based on an infraction of the rules will not succeed unless the infraction was substantial enough to prejudice the appellant's case. *Bell v. Swift & Co.*, 5th Cir., 1960, 283 F.2d 407; *Tiedman v. American Pigment Corp.*, 4th Cir., 1958, 253 F.2d 803; Fed. R. Civ. P. 61; *Wright, Federal Courts*, §81 at 312 (1963). Applying the same standard of review, we conclude that the denial of the motion for leave to take depositions was a technical error

which did not result in prejudice to . . . [Petitioner's] case."[4]

This Court has refused to distinguish between direct and indirect relevance where a party is denied discovery to which it is entitled. *Jencks v. United States*, 353 U.S. 657, 671 (1957). The Court of Appeals' attempt to examine the denial of discovery in terms of whether it was prejudicial[5] must fail for the same reason; in *Jencks* as here, such lines cannot be drawn by appellate courts because they require re-evaluation of all the facts. This is the exclusive function of the Labor Board.

The Court of Appeals attempted to avoid the dilemma of re-evaluating facts (and thereby entering into activity which it recognized was prohibited) or else remanding the case to the Labor Board, by finding the denial of discovery to be non-prejudicial. Its ground for this conclusion was that discovery was not necessary in that Petitioner could at trial have called available witnesses in order to create contradiction. This is ridiculous. It is nothing but an affirmation of the ancient "trial by chance", which the entire discovery process under the Federal Rules was designed to eliminate. *Hickman v. Taylor*, 329 U.S. 495 at 501 (1947). See also 4 Moore, Federal Practice, ¶26.02[1], pp. 1031-1036; Clark, Code Pleadings, 567-568 (2d ed. 1947).

---

[4]None of the cited authorities dealt with denial of discovery. The Court of Appeals does not indicate how the citations are authority for denying discovery. As the Court in *Tiedman v. American Pigment Corporation, supra*, at 808 stated: "a trial is not a sporting event." Denial of discovery makes it one.

[5]The decision of the Court of Appeals postulated that the Petitioner in seeking discovery, "showed good cause for granting the motion and that a procedural error was committed" (Appendix A, *infra*, p. 6a, R., Vol. III, 128). Having found the existence of error, the Court of Appeals then determined the error to be non-prejudicial.

The Court of Appeals in effect said that denial of discovery was non-prejudicial because trial-in-the-dark was possible. Without pre-trial preparation no litigant is willing to take the risk of examination of hostile witnesses at a hearing to establish contradiction or to obtain information in order to build his case. Cf. *Pacific Molasses Company v. F.T.C.*, 356 F.2d 386, 390 (5th Cir. 1966). ("Effective cross-examination requires thorough preparation by counsel before trial.") Discovery procedures were created to eliminate this dilemma. The Court of Appeals found authority for discovery in Labor Board's hearings, approved the Labor Board's rules authorizing discovery on showing of good cause, postulated the good cause, then found no prejudice in denial of discovery. The underlying purpose of discovery is adequate refutation of the Court of Appeals' conclusion.

But, in addition, the Court of Appeals stated after reviewing certain evidence that:

> "Although [Petitioner's] rebuttal evidence might have led us to a different result had we been the original triers of fact, we cannot, under the substantial-evidence rule, say that the Board, following the Examiner, was unreasonable in believing the employees or that its findings were not based upon such relevant evidence as a reasonable mind might accept." (Appendix A, *infra*, p. 12a; R., Vol. III, 134).

Thus the Court of Appeals admitted that even without affording the benefit of discovery to the Petitioner, the Labor Board had been unable to present a convincing basis for its conclusions. Adequate discovery would cer-

tainly have permitted more adequate presentation of rebuttal evidence, particularly on the issue of Petitioner's economic motivations.

Petitioner would have been afforded a fair hearing had discovery been permitted.

2. There is no basis for the Labor Board's claim that the use of discovery procedures is not available (See Labor Board's Petition for Rehearing (R., Vol. III, 159) or that it should not be available.

The Court of Appeals correctly held that under Section 10(b) of the Act depositions were permitted:

> "Any such unfair labor practice proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for district courts of the United States, . . . ".

Rules 26-37 of the Federal Rules of Civil Procedure provide for discovery and Section 10(b) of the Act specifically provides for unfair labor practice proceedings to be conducted in accordance with those same Federal Rules of Civil Procedure. The statutory requirement is clear. Nonapplication of the Federal Rules is permitted only if application is not practicable. Rules 102.30 and 102.35 of the

Labor Board's own Rules and Regulations authorize the taking of depositions in unfair labor practice cases.[6]

There has been no allegation or showing by the Labor Board that in this case it was not practicable for the discovery provisions of the Federal Rules of Civic Procedure to be applied. The Board's refusal to allow Petitioner prehearing discovery was based upon its assumption that it cannot, will not, and should not permit discovery. For the Labor Board arbitrarily to decide that it will not allow discovery in its proceedings is not only violative of both the letter and the spirit of the Act; it is violative of elementary principles of fair play, the provisions of the Administrative Procedure Act which provide for discovery and require a fair hearing, and the due process guarantee of the Fifth Amendment to the Constitution.

In *NLRB v. Southern Materials Company*, 345 F.2d 240, 244 (1965), the Court of Appeals for the Fourth Circuit reached the same conclusion as to the availability of discovery under the Act as that reached by the Court of Appeals here. The Court of Appeals for the Seventh Cir-

---

[6]Section 102.30 provides for the taking of testimony "by deposition". Section 102.35 affords Trial Examiners the authority "to take or cause depositions to be taken whenever the ends of justice would be served thereby." The Court of Appeals below has apparently believed that the Labor Board's rule provided for pretrial discovery. See *NLRB v. Movie Star, Inc.*, 361 F. 2d 346, 352 (1966), cited in the Court of Appeals' decision. (Appendix A, *infra*, p. 6a n.6; R., Vol. III, 127 n. 6) The Labor Board, however, now asserts that depositions are permissible only to perpetuate the testimony of unavailable witnesses. This restricted definition did not come to light until the Labor Board's Petition for Rehearing filed in this case (R., Vol. III, 159). Such a definition is not only contrary to Section 556(c)(4) of the Administrative Procedure Act but also ignores the Labor Board's Rules and Regulations and thereby violates administrative due process of law. *Pacific Molasses Company v. F. T. C.*, 356 F. 2d 386, 387-390 (5th Cir. 1966).

cuit has reached a contrary conclusion. *NLRB v. Vapor Blast Manufacturing Company*, 287 F.2d 402, 408 (7th Cir. 1961). This Court should resolve the conflict.

The Labor Board has always shown a total unwillingness to follow due administrative procedure. The Labor Board refused to apply even the *Jencks* rule until compelled to by the appellate courts. *NLRB v. Adhesive Products Corporation*, 258 F.2d 403 (2nd Cir. 1958). And even when it applied *Jencks*, it did it in an impermissibly limited manner. *Harvey Aluminum (Incorporated) v. NLRB*, 335 F.2d 749 (9th Cir. 1964).[7]

No justification exists for the Labor Board's position. It cannot claim that the need to protect employees outweighs rights to discovery in view of the extension of discovery to the area in which the informer privilege was first utilized. *Jencks v. United States*, *supra*. Present rules of criminal procedure allow a defendant to obtain the use of discovery procedures. If an employer seeks retribution against an employee for giving information, the Labor Board has adequate means of protecting the employee under Section 8(a)(4) of the Act. In addition, the names of employees included in an unfair labor practice charge are revealed at the hearing. In fact labor law practitioners believe that the use of discovery would decrease the Labor Board's "workload and would also decrease the period of time between the issuance of a complaint and the transfer of the case to the Board." *Report*

[7]The Labor Board has been equally unwilling to comply with the Administrative Procedure Act in formulation of substantial rules. See Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L. J. 719 (1961); *Boire v. The Miami Herald Publishing Co.*, 343 F. 2d 17 (5th Cir. 1965).

of the Committee on Practice and Procedure under the National Labor Relations Act, Section of Labor Law, A.B.A. Rep. 232 (1966). The question is not protection of *employees* but protection of the advantage the Labor Board gains from trial-in-the-dark. There is no reason why a defendant in a Labor Board hearing should be entitled to fewer procedural rights than a defendant before other administrative agencies[8] or a defendant in a court of law. As Mr. Lee Loevinger, Federal Communications Commissioner and former Assistant Attorney General of the United States recently stated:

> "... I suggest that the most important initial reason for the Government agencies desire not to have discovery is the simple desire to retain an advantage in litigation. If you have the subpoena power and you have the right to investigate and the right to look at all your opponent's files, if you have the right to interrogate his officials and he has no comparable rights with respect to your clients or your interests, would you willingly give them up if you had any choice? Of course not. No sensible lawyer would".[9]

That such a position is understandable does not make it correct.[10]

---

[8]Among those administrative agencies which allow discovery are the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, the Federal Communications Commission and the Federal Trade Commission. *Pre-Trial Discovery and Preparation for Trial* 20 Ad. L. Rev. 55, 59ff (1967).

[9]*Id.* at 80.

[10]Congress has also recently recognized the administrative agencies' penchant for secrecy and has had to, by statute, require administrative agencies to afford the public access to information in their possession. See Administrative Procedure Act, 81 Stat. 54, 5 U.S.C. §552 (Appendix B, *infra*, p. 49a-50a).

3. The Court of Appeals suggested that no impasse existed at the time Petitioner instituted a wage reduction and therefore the finding of refusal to bargain could rest on a determination not involving credibility. The Labor Board had made no such determination and therefore the Court of Appeals' refusal to remand the question to the Labor Board — the primary trier of fact — was in error. But assuming, *arguendo*, that the Court of Appeal had authority to make this determination, the determination is flatly contrary to this Court's determination in *NLRB v. Katz*, 369 U.S. 736 (1962). *Katz* held that a unilateral change in wages may lawfully be made subsequent to an impasse. The Court of Appeals' contrary determination cannot stand and cannot be used to circumvent the effects of denial of discovery here.

No one — not the witnesses, the Labor Board, nor the Court of Appeals — held that an impasse in bargaining had not occurred. The only testimony on this subject was that of Union Negotiator Alden. Alden stated:

> "Mr. Dean [the Federal Mediator] did all in his power, I believe, with both sides to see if some agreement could be reached. However, it did not appear possible . . . apparently, the position was hopeless as far as the Company was concerned; the Union representatives feeling the same."****
>
> I felt the negotiating could not be fruitful unless the Company would consider the negotiations at least at the current rate of pay and the benefits the employees were receiving at that time." (R., Vol. II, 30-31).

The Labor Board, acknowledging the existence of a bargaining impasse, found that the impasse was not "genuine" because of Petitioner's bad motivation — based on its credibility resolutions. The Court of Appeals suggested that the impasse somehow dissolved. The Court of Appeals stated:

> "... in fact, [the Union] was constantly revising proposals until finally it announced in August that it was prepared to accept the exact terms of the expired contract." (R., Vol. III, 135).

But the wage reduction was made immediately after impasse and well prior to the first meeting between the parties after impasse. In fact, there were no meetings for 37 days after the impasse. The Court of Appeals' decision prevents any action after impasse. Under that decision if one side gives in after a strike occurs, the existence of an impasse at the time of strike is *retroactively* destroyed. The decision of the Court of Appeals means a union could always preclude an employer from instituting a unilateral change subsequent to an impasse by waiting for a unilateral change to be effected and then stating that it is willing to negotiate on the issue. This Court's ruling in *Katz* prohibits such a decision and requires reversal of the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

P. D. THOMSON

JOSEPH Z. FLEMING
Attorneys for Petitioner
Paul & Sams,
1314 First National Bank Building,
Miami, Florida. 33131

January, 1968